IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 43

STEFENA BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

In this Supplemental Memorandum we propose to discuss the following issue not covered in Petitioner's original Brief:

> Assuming that Petitioner's claim of self-incrimination was properly overruled by the Trial Court, did her refusal to answer constitute a "contempt" within the meaning of Title 18, U.S.C., Sec. 401?[1]

[1] This question was initially raised by Mr. Justice Frankfurter during the Government's presentation at the oral argument. It is further suggested by the Court's order of June 10, 1957 directing that this case and *United States v. Yates* (No. 15, Oct. 1956 Term) be reargued. A similar issue is presented in *Yates*.

The relevant portion of Title 18, U.S.C., Sec. 401 provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; • • • (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Ever since the decision of this Court in *Ex Parte Hudgings*, 249 U.S. 378, 383; 39 S.Ct. 337, 11 A.L.R. 333 (1949), it has been settled law in the Federal Courts that:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element *must clearly be shown in every case* where the power to punish for contempt is exerted . . ."[2] (Emphasis ours)

This holding in *Hudgings* was reiterated by this Court in *In Re Michael*, 326 U.S. 224, 227; 66 S.Ct. 78 (1945) where, allegedly "false and evasive" testimony before a grand jury was held by the lower courts to be an obstruction punishable as a contempt. In reversing, this Court said:

> "Not very long ago we had occasion to point out that the Act of 1831, 4 Stat. 487, from which Sec. 268 of the

[2] In *Hudgings*, *supra*, the witness' claimed inability to positively identify certain handwritings was regarded by the trial court as false testimony. The witness was summarily adjudged guilty of a contempt in the presence of the Court and committed to jail until he should purge himself. He also was indicted for perjury. His release on bail under the indictment was inoperative because of the commitment for contempt. He petitioned for habeas corpus.

> Judicial Code derives, represented a deliberate Congressional purpose drastically to curtail the range of conduct which Courts could punish as contempt. *Nye v. United States*, 313 U.S. 33, 44-48, 61 S.Ct. 810, 813-816, 85 L.Ed. 1172. True, the Act of 1831 carries upon its face the purpose to leave the courts ample power to protect the administration of justice against immediate interruption of its business. But the references to that Act's history in the Nye case, supra, reveal a Congressional intent to safeguard constitutional procedures by limiting courts, as Congress is limited in contempt cases, to 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat. 204, 231, 5 L.Ed. 242. The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury. It is in this Constitutional setting that we must resolve the issues here raised."

Thus, it is clear that the qualifying clause, "obstruct the administration of justice," which appears in the first part of Sec. 401 above, has been construed by this Court as a qualification upon the power of the Federal Courts to punish under the third clause of that Section as well. From this it follows that it is not every act of misbehavior or failure to obey a lawful order of a Federal Court which constitutes a contempt within the meaning of the second and

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[3] Again, in *Offutt v. U.S.*, 348 U.S. 11, 75 S.Ct. 11, at p. 13, this Court reiterated that "the pith of this rather extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of Federal crimes generally, is that the necessities of the administration of justice requires such summary dealing with obstructions to it. It is a mode of vindicating the majesty of the law, in its active manifestation, against obstruction and outrage . . ."

third clauses of Section 401; but rather only such misbehavior or disobedience as is "clearly . . . shown" to have obstructed the Court in the administration of justice (*Ex Parte Hudgings, supra*).

Even if it is assumed, therefore, that the Trial Court here was correct in its ruling that Petitioner waived her Fifth Amendment privilege when she voluntarily took the witness stand (Tr. 33, 34, 40), the refusal of Petitioner to comply with the Court's order that she answer was not punishable as a contempt because the record here fails to show that her refusal obstructed the Court in any manner. Moreover, there is no finding of such an obstruction in the Trial Court's rulings nor in his certificate. Cf. *Fischer* v. *Pace*, 336 U.S. 155, 160.[1] If, as *Ex Parte Hudgings, supra*, clearly holds, the element of obstruction "is the characteristic upon which the power to punish for contempt must rest," then it follows that this essential ingredient of the offense of criminal contempt must be shown by the record here and must be found by the Trial Court.

On the contrary, an examination of each of the questions refused by Petitioner (see pp. 6-7 of Petitioner's Brief) shows that an answer by Petitioner was not necessary to the Government's proof; each of these questions already had been answered by one or another of the Government's witnesses and nowhere in the entire direct examination of Petitioner (Tr. 19-32) is there any denial of the testimony given by these witnesses with respect to these questions. Indeed, with respect to Questions 2, 3 and possibly 7, Petitioner already had answered while testifying as a witness under the Rule (see Petitioner's Brief, Notes 4, 5 and 6).

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[1] In both the *Hudgings* and the *Michael* cases the trial court expressly found that conduct of the witness was an obstruction to the Court in the administration of justice.

Nor does the opinion of the Trial Court evidence any difficulty experienced by the Court in arriving at its conclusion to revoke Petitioner's citizenship. On the contrary it is readily apparent from the Court's opinion that all of Petitioner's testimony on direct examination was ignored by the Court, except insofar as her testimony was corroborated by the Government's witnesses (see Reprint of Full Opinion, pp. 5-6). (Cf. *United States* v. *Goldstein*, 158 F.2d 916, 921 (CADC, 1947), no obstruction where court not misled by false affidavit.)

Further, it is clear from the Petitioner's demeanor upon the stand and from the manner in which she invoked the Fifth Amendment privilege that her conduct was not contumacious; her refusal proceeded from a conscientious belief, based upon the advice of her trial counsel, that the Constitution protected her in such refusal. In response to the Court's direction that she answer, she replied (Tr. pp. 33-34):

> "I am sorry, your Honor, I just cannot answer that question. I am under the Fifth Amendment. I am sorry I have to do that."

Over and over again she repeated her regret that she could not concur with the Trial Court's ruling that the protection of the Fifth Amendment was not available to her (Tr. pp. 35-38).[1]

[1] Unlike the defendant in *U. S.* v. *Appel*, DC, 211 F. 495 (referred to in *In re Michael*, *supra*, at pp. 228-229), it cannot be argued that Petitioner's reasons for refusing to obey the Court's direction was "a transparent sham" and was not bona fide and sincere. Instead, what we have here is a situation analogous to that recently before this Court in *Konigsberg* v. *California*, 353 U.S. 252, 77 S.Ct. 722 at p. 732, where the Court observed that the refusal to answer on First Amendment grounds as to membership in the Communist Party "was not frivolous" but "was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making."

It is true, of course, that every refusal to answer a proper question has some "obstructive" effect upon the Court in its function of ascertaining the truth. But such incidental obstruction as flows from an erroneous claim of a Constitutional privilege is not the kind to which Section 401 is addressed. Cf. *In Re Michael, supra*, at pp. 227-228. Faced with a refusal to answer, it becomes the duty of the Trial Court to ascertain if there is a reasonable basis asserted in good faith for such refusal to answer. The worst that can be said for Petitioner's refusal here (under our assumption that the Trial Court was correct) is that it was grounded upon a misconception of her legal rights in an area where, it must be admitted, the general law is not free from doubt.[6] The choice she faced was to accept the Trial Court's ruling and forego any opportunity to test the validity of that ruling or stand upon her claim and risk the penalty of contempt.[7] Her inexperience in such matters, her limited formal education, and her previous answers to some post-1946 questions put to her by Government counsel which were not regarded by the Trial Court as a waiver,[8] all combined to convince her of the legal merit

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[6] See comment by Justice Black in *Rodgers v. U. S.*, 340 U.S. 367 at page 378: ". . . Moreover, today's holding creates this dilemma for witnesses: 'On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single question.' The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it."

[7] The Trial Court apparently felt that the issue of waiver by taking the stand in a civil case was not free from doubt, for defense counsel was told: "I want to give you every right to have this question determined by an appellate court." (Reprint of Full Opinion, p. 12.)

[8] Such inquiries as "Do you know a Virgil Stewart?" "William Nowell," "Bernice Baldwin," "Earl Reno?" (Tr. p. 12); "Did you ever at any time pay Communist Party dues to Bernice Baldwin" (Tr. pp. 15, 16), were answered by Petitioner even though they were not in terms limited to the pre-1946 period.

of her counsel's advice. And that advice, in turn, was based upon this Court's repeated rulings in the *Bradstein* cases (254 U.S. 71, 41 S.Ct. 26; 262 U.S. 355, 43 S.Ct. 562).

If counsel was in error, certainly Petitioner should not be penalized with six months' imprisonment because she elected to obtain a ruling on that issue from this Court. Cf. *Watkins* v. *United States*, 354 U.S. ——, 77 S.Ct. 1173; and *Sweezy* v. *New Hampshire*, 354 U.S. ——, 77 S.Ct. 1203.

It is a tenable conclusion, we think, that both Petitioner and her trial counsel were actually misled by the Trial Court's ruling in the first instance (Tr. p. 33). Had the Trial Court made it clear that it was of the view that Petitioner's direct testimony, and not the mere act of taking the witness stand, was the basis for applying the waiver doctrine, both Petitioner and her trial counsel might have pursued a different course. For it might well be that while they were reasonably certain of the merits of their contention that taking the stand was not a waiver, they may not have felt as strongly with respect to the waiver effect of Petitioner's general denials made on her direct examination.

But having been emphatically told and retold by the Trial Judge of the precise ground for his ruling, and being of the conviction that the ruling was in violation of her constitutional right, Petitioner and her trial counsel were thus led to adhere to their initial position. Not until the appeal stage was reached was it even suggested that there had been a waiver by prior testimony.* At this point in the proceedings—and because they were misled by the Trial Court's ruling—it was too late for Petitioner and her trial counsel to make an informed choice and, perhaps, recede from the initial refusal to answer questions, thus avoiding the risk of an adverse ruling on appeal. Cf. *Quinn*

v. United States, 349 U.S. 155, 165; 75 S.Ct. 668. Under these circumstances, not only was there no obstruction, but the requisite criminal intent likewise is missing. Hence, Petitioner's refusal did not amount to a criminal contempt and there was no power in the Trial Court under Section 401 to summarily punish for contempt. See *Carlson v. United States*, 209 F.2d 209, 214 (C.A. 1st, 1954).

There is an additional reason why the Trial Court here lacked power to summarily punish for contempt. In *In re Michael*, *supra*, this Court observed (at p. 227) that the power of the Federal Courts to punish for contempt is limited to "the least possible power adequate to the end proposed." This, we interpret to mean, that if any other remedy, short of the exercise of the drastic power of summary contempt, is available to the Trial Court to remove any obstruction to the administration of justice, that remedy must be used.[10] Our inquiry, then, is what less drastic remedy was available to the Trial Court under the circumstances of this case? The answer is, the Court might have stricken all of the testimony offered by Petitioner on her direct examination. This is the procedure followed by several State courts where the action of the witness prevents proper cross-examination by the adverse party. Indeed, this procedure has been followed even where the claim of the privilege is upheld by the Court.

> "If a correct ruling by the Court sustaining the claim of privilege deprived a party of the right to an adequate cross-examination, the party is entitled to have stricken the pertinent matter given by the witness on direct examination." (*Am. Law Institute, Basic Problems of Evidence*, by Edmund M. Morgan, at page 152.

[10] At the oral argument Government Counsel agreed with Mr. Justice Brennan's comment regarding the severity of the six-month sentence imposed on Petitioner.

citing *McElhannon* v. *State*, 99 Ga. 672, 26 S.E. 501, 505 (1896); *State* v. *Perry*, 210 N.C. 796, 188 S.E. 639, 640 (1936); *Thomas* v. *Bowler*, 162 Wash. 54, 297 Pac. 1094, 1095 (1931).) See also 58 Am. Jur. "Witnesses," p. 56; and *United States* v. *Keown*, 19 F. Supp. 639, 646; and *Summit Drilling Corp.* v. *C.I.R.*, 160 F.2d 703 (C.A. 10).[11]

In effect, this is what the Trial Court did here (in addition to sentencing Petitioner for contempt); for, as we have seen, the Court appears to have ignored all of Petitioner's direct testimony except insofar as that testimony was corroborated by other witnesses.

Not only is this less drastic remedy required by the limitations imposed upon the Federal Court's contempt powers, but it relieves one who claims the Fifth Amendment privilege in good faith from the possibility of a criminal penalty (imposed without the procedural safeguards of the Bill of Rights), in the event it is eventually determined by an appellate court that the privilege was improperly claimed. Had the Trial Court here confined itself to "the least possible power adequate to the end proposed" by merely striking all of Petitioner's direct testimony, the question of the propriety of its ruling could then be litigated on appeal in the denaturalization case—a civil proceeding—without fear of criminal penalties in the event the claim was erroneously made. Where, however, as here, the more

[11] A more drastic remedy, provided by statute or court rule in some states, permits the trial court under such circumstances to strike the entire answer of the recalcitrant defendant-witness and enter judgment by default. See 144 ALR 372; 4 ALR 2d 348; and 14 ALR 2d 580. It has been held that the Federal Courts lack such authority. *Hovey* v. *Elliott*, 167 U.S. 409, 17 S.Ct. 841. In any event in a denaturalization proceeding the Government must prove its case regardless of the defendant's default. *Klapprott* v. *U. S.*, 335 U.S. 601, 69 S.Ct. 384, 388.

drastic power of summary contempt is invoked, the necessary effect is to inhibit conscientious witnesses from any bona fide invocation of the protection of the Fifth Amendment privilege, notwithstanding such invocation is pursuant to advice of counsel.

CONCLUSION

The Judgment Below Should Be Reversed.

Respectfully submitted,

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